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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUN 19 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Request for Review of the Decisions of the)	
Universal Service Administrator)	
)	
El Monte Unified High School District)	Application No. 311437
Hemet Unified School District)	Application No. 295589
Inglewood Unified School District)	Application No. 313520
Lucerne Valley Unified School District)	Application No. 314228
Romoland Elementary School District)	Application No. 305956
Rosemead Elementary School District)	Application No. 303357
)	
Schools and Libraries)	CC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

**JOINT CONSOLIDATED REQUEST FOR REVIEW
OF DECISIONS OF THE UNIVERSAL SERVICE ADMINISTRATOR**

EL MONTE UNIFIED HIGH SCHOOL DISTRICT
HEMET UNIFIED SCHOOL DISTRICT
INGLEWOOD UNIFIED SCHOOL DISTRICT
LUCERNE VALLEY UNIFIED SCHOOL DISTRICT
ROMOLAND ELEMENTARY SCHOOL DISTRICT
SPECTRUM COMMUNICATIONS CABLING
SERVICES, INC.

June 19, 2003

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TABLE OF CONTENTS

Summary.....	ii
I. Preliminary Statement.....	2
II. Request for Expedited Review	10
III. The Decisions and Further Explanations.....	11
IV. Spectrum Was Not Improperly Involved in the Applicants' Competitive Bidding and Vendor Selection Process.....	13
A. There Is No Prohibition on the Types of Vendor Involvement SLD Now Deems Improper.....	14
1. The Form 470 Process	15
2. The Competitive Bidding and Vendor Selection Process.....	17
3. Post-Vendor Selection	18
4. Program Integrity Assurance and Selective Review Information Request.....	19
B. SLD's Conclusions Regarding the Applicants' Forms 470 Are Premised on Mistaken Factual Determinations	21
C. Spectrum Was Not Improperly Involved in Any Applicant's Competitive Bidding and Vendor Selection Process.....	25
D. The Prohibition on Vendor Assistance in the Selective Review Process Constitutes Unlawful Retroactive Application of New Procedures	28
E. The Applicants Prepared the Information Request Responses	30
F. The Applicants Conducted a Fair and Open Bidding Process and Did Not Surrender Control to Spectrum	32
V. Conclusion.....	35
Attachments 1-5	
Spectrum Communications Cabling Systems, Inc. Declaration	
El Monte Unified High School District Declaration and Exhibits	
Hemet Unified School District Declaration and Exhibits	
Inglewood Unified School District Declarations and Exhibits	
Lucerne Valley Unified School District Declaration and Exhibits	
Romoland Elementary School District Declaration and Exhibits	
Rosemead Elementary School District Exhibits	

SUMMARY

SLD denied Funding Year 2002 requests for internal connections services for six California school districts based on purported “similarities” in the Applicants’ Form 470 service descriptions and in their responses to Selective Review Information Request questions, from which SLD concluded that there was “improper vendor involvement.” The cited similarities, to the extent they exist, do not indicate a violation of any E-Rate Program rule or policy. Vendor involvement with applicants during the funding process is encouraged and in some instances required. The assistance provided by the Applicants’ vendor, Spectrum, was entirely consistent with program rules and guidelines.

On May 13, 2003, SLD announced a new policy specifically prohibiting vendor assistance with Information Request responses – one of the bases for the denials that are the subject of this Request for Review. The May 13 announcement of the new policy, which contradicts prior SLD guidance concerning vendor assistance, confirms that application of that new policy to the Applicants constitutes an unlawful retroactive penalty, which exceeds SLD’s authority to adopt, and must be reversed.

The Applicants serve student populations that are overwhelmingly low income and primarily rural. Their students have been and continue to be substantially harmed by the funding denials. The parties respectfully request expedited consideration of this Request for Review in order to promptly reverse the SLD’s decisions and grant the Applicants’ Funding Year 2002 requests.

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To: The Chief, Wireline Competition Bureau

**JOINT CONSOLIDATED REQUEST FOR REVIEW
OF DECISIONS OF THE UNIVERSAL SERVICE ADMINISTRATOR**

The El Monte Unified High School District (the "El Monte District"), the Hemet Unified School District (the "Hemet District"), the Inglewood Unified School District (the "Inglewood District"), the Lucerne Valley Unified School District (the "Lucerne District"), and the Romoland Elementary School District (the "Romoland District"), and Spectrum

Communications Cabling Services, Inc. d/b/a Spectrum Communications (“Spectrum”),¹ pursuant to Sections 54.719(c) and 54.722 of the Commission’s rules,² hereby jointly request expedited review and reversal of the April 22, 2003 Funding Commitment Decisions (the “Decisions”) and the April 22, 2003 Further Explanation Letters (“Further Explanations”) issued by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) in connection with the above-referenced applications.³

I. PRELIMINARY STATEMENT

The Parties jointly request consolidated review of the decisions denying the Applicants’ requests for E-Rate funding. Consolidated review is appropriate because the denials are based on SLD’s identical determinations and conclusions as to each Applicant, and the bases for this Request for Review are the same for each Applicant. Consolidated review of the denials will conserve limited resources for the Applicants, for Spectrum, and for the Commission, and will result in administrative efficiency.

After spending more than one year reviewing the Applications, SLD denied the Applicants’ requests for E-Rate funding for internal connections based solely on limited factual “similarities” that violate no applicable rule or policy. Unable to cite any action by the Applicants or Spectrum that violated Commission or SLD rules or precedent, SLD determined

¹ The El Monte District, Hemet District, Inglewood District, Lucerne District, Romoland District, and Spectrum are referred to herein collectively as the “Parties”. The El Monte District, Hemet District, Inglewood District, Lucerne District, Romoland District, and Rosemead Elementary School District (“Rosemead District”) are referred to herein individually as an “Applicant” and collectively as the “Applicants”.

² 47 C.F.R. §§ 54.719(c), 54.722.

that those “similarities” warranted a conclusion that Spectrum was “improperly involved” in the competitive bidding and vendor selection process. This conclusion, which is based on findings that are not consistent with the facts or applicable E-Rate Program rules, results in the retroactive application of a new standard of which the Applicants and Spectrum had no notice, and which SLD is without authority to implement.

Any party aggrieved by an action taken by a division of USAC may seek review from the Commission.⁴ Each Applicant, and Spectrum, as parties aggrieved by the Decisions and Further Explanations, thus has standing to seek review of the funding denials.

Applicant El Monte District is located in East Los Angeles County and is comprised of seven high schools (grades 9-12). Two of the seven campuses are “continuation” or alternative education schools. Demographically, the District’s 9,700 students are overwhelmingly Hispanic (76.9%), with students of Southeastern Asian descent comprising the next largest ethnic group (15.9%). Many of these students are from families that have recently immigrated to America and for whom English is not the primary language. The District’s percentage of students participating in the free and reduced priced school lunch program is 64.5%.

El Monte District’s physical facilities are extremely old, and adding internal connections to the buildings is an extremely expensive endeavor. The District is fortunate to have been the recipient of previous E-Rate discounts which were used to begin the installation of communications backbones and related network infrastructure. Yet, not every classroom has the

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Each Further Explanation states that the Funding Commitment Decision is “the official action” by SLD and USAC. Nonetheless, in light of certain statements contained in the Further Explanations, review is requested of both the Decision and the Further Explanation as applicable to each Applicant.

same degree of Internet access and there still remains a significant amount of work to be done to provide all students with adequate internet access in the classroom.

Without E-Rate funding, many El Monte District students would not have access to computers or the Internet, and therefore could not develop the skills that are gained with the continued use of such technology. The El Monte District seeks E-Rate Year 5 funding in order to provide access and endow its students with both a desire to learn and the professional skills that will assist them with fully integrating in society.

Applicant Hemet District is located in a rapidly developing, former agricultural region of central Riverside County, California. Until recently, dairy and produce farming was the primary industry of the Hemet Valley. Currently, the major employment opportunities for the residents of Hemet are either with public sector employers such as the Hemet Valley Hospital District and the Hemet Unified School District, or with the few private sector employers in the valley, most notably the local Target retail store and the local Home Depot store. The median annual household income for residents of Hemet is \$24,024.

Hemet District serves a student population of approximately 18,169 students in grades K-12 on 20 campuses. Hemet District has a substantial number of students from low income families with nine of the school campuses qualifying for a 90% E-Rate discount (75% or more of the students receiving a free or reduced priced school lunch) and eight of the campuses qualifying for an 80% E-Rate discount (50%-74.9% of the students receiving a free or reduced

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47 C.F.R. § 54.719(c).

priced school lunch). Of the entire student population, 68.5% are recipients of a free or reduced price school lunch.⁵

Hemet District has experienced a sustained and explosive growth rate (9.6%) in student enrollment since fiscal year 2000. This is primarily caused by families relocating to the area in an effort to flee urban blight or to find affordable housing. This rate of growth has placed a significant strain on all educational resources. Inadequate classroom space, an insufficient number of teachers for all subject areas, inadequate books supplies and insufficient access to the Internet are just a few of the problems that have been exacerbated by the recent growth in student population. The District's goal of ensuring adequate access to technology and the Internet for all students was severely limited in its prior fiscal year (E-Rate program year 2001) when the SLD denied the District's entire E-Rate application for discounts, including all requests for telecommunications, internet access, and internal connections reimbursements. These efforts have been further debilitated by the denial of the Hemet District's Year 2002 Application, which sought funds needed to complete the installation of a communications backbone and related network infrastructure on school campuses.⁶

The Inglewood District is located in South Central Los Angeles, approximately one mile from Los Angeles International Airport. The Inglewood District is a comprehensive school district serving students in grades K-12, with a total enrollment of approximately 17,723 students. Demographically, the District's students are almost evenly divided between students

⁵

This data may be skewed, however, as it is the tendency of some students in the middle and high school age range to not apply for meal benefits, as they perceive a stigma associated with being classified as poor or needy.

with a Hispanic ethnic background (57.6%) and an African American ethnic background (41.2%). A significant number of students (61.1%) receive a free or reduced priced school lunch.

The Inglewood District's buildings and facilities were constructed between the early 1900s and 1961. Consequently, a significant amount of work is required to install basic telecommunications infrastructure in order to provide Internet access to classrooms and other learning areas. Denial of the Inglewood District's E-Rate discounts for Funding Year 2002 has left it unable to expand Internet access and the level and quality of technology available to the students.

Lucerne Valley is a remote limestone mining area (total population 6,357) located in the Mojave Desert of San Bernardino County, California. The Lucerne District has approximately 1,509 students enrolled in five schools. Two of the District's schools are "continuation" schools (also known as "alternative education programs") designed for students who do not meet the guidelines of a normal educational environment. The other three campuses consist of one elementary school (grades K-6), one middle school (7-8), and one high school (9-12). The current free and reduced lunch program participation for the District is 61.7%.⁷

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Ironically, Hemet District's ability to use a service that was approved for funding by SLD – a high speed Internet Access circuit to provide a connection to the Digital California Project and the Internet in the classrooms – cannot be used without the internal connections for which funding has been denied.

⁷

Lucerne District believes that this rate does not demonstrate the actual level of poverty within the Lucerne Valley. The District believes that the participation rate of the entire District should directly correlate to the rate of the elementary school, as the students at the elementary school are from the same families as the students in the District's other schools. Older students who do not participate in the free and reduced price lunch program are most likely afraid that they will be ostracized by their peers if they are seen receiving free or reduced priced meals. Nevertheless, the reported participation rate of 61.7% is still indicative of a relatively high level of poverty in the Lucerne Valley.

One of the Lucerne District's educational goals is to expose students to ideas and cultures outside the cultural and geographical boundaries of the Valley. The District feels this will help foster positive attitudes and provide for students' continued achievement at the upper-grade levels and, hopefully, to college and beyond. As a result of the denial of funding for internal connections, the Lucerne District has been forced to significantly delay, if not abandon altogether, the installation of classroom network connections that is part of the plan to obtain this goal.

Applicant Romoland District is located in a rural farming area of central Riverside County, California, and is comprised of two school campuses serving grades K-8. The District has approximately 1,614 students who are predominantly Hispanic, with English rarely spoken in their homes. An overwhelming number of the students come from families that are living at or below the national poverty level, as evidenced by 74.6% of the students receiving a free or reduced priced school lunch. As a result of their poverty many, if not most, of these students do not have computers at home. Access to technology is even further limited by the decrease in expenditures by Riverside County for public services that has resulted in a severe reduction in the service hours of the library nearest to the students' homes. The library is now open only 22 hours per week, spread over just three days.

For Romoland District students, school is the primary source of a safe, stable environment with exposure to outside cultures and ideas that they would not otherwise receive. This exposure to outside cultures as well as Internet-based educational curricula is, to a large degree, dependent on a technology literacy program that can barely exist without the help of the E-Rate Program. As a result of the denial of both the District's Year 4 and now the Year 5 E-

Rate applications, the Romoland district has been severely hindered in its efforts to provide technology access in the classroom.

Rosemead District is located in East Los Angeles County and has approximately 3,421 students enrolled in grades K-8. The District has four elementary schools (K-6) and one middle school (7-8). Approximately 80% of all students receive a free or reduced priced school lunch. Very little technology has been installed in Rosemead District primarily because its needs generally have been subordinated to the demands of much larger school districts located in the area surrounding the District. The District also has had difficulty staffing and maintaining an IT department because of its small size. Consequently, efforts to plan, integrate, and support technology within the District's schools have been severely hindered. The E-Rate discounts would greatly increase the District's ability to address these problems.

Spectrum, a privately held corporation located in Corona, California, is a provider of information technology products and services. Founded in 1985, Spectrum started out primarily installing communications cabling for organizations seeking to upgrade their communications capabilities, and later began selling and installing the devices and software that are eventually connected to that wiring.⁸ These products include routers, switches, multiplexers, servers, workstations, phone systems, operating systems, application software and security software. Spectrum also designs and installs wireless networks.

⁸

Spectrum now has 120 employees, comprised primarily of minorities and women. Spectrum has been listed on Inc. Magazine's annual list of the 500 fastest growing companies in the U.S. for each of the past five years. Its founder and CEO, Robert Rivera, was named Hispanic Business Magazine's Entrepreneur of the Year for 2000, and twice has been the Ernst & Young Inland Empire Entrepreneur of the Year first runner-up. Mr. Rivera also serves on the USAC Board of Directors.

Spectrum's customer base is primarily the education market, public sector agencies, and large healthcare facilities. The company has participated in the E-Rate Program since 1998. Since then, Spectrum has acted as a service provider for approximately 38 different school districts, and has successfully completed E-Rate related contracts valued at approximately \$100,000,000. Based on Spectrum's experience with the E-Rate Program, the California Department of Education invited the company to serve as a Voluntary E-Rate Trainer.⁹ In its capacity as a State trainer, Spectrum develops and creates training program materials and reference documents, makes presentations at State-hosted applicant training workshops, and supplies advice to applicants through California's E-Rate ListServe (Electronic Forum). As part of the agreement between Spectrum and the State, marketing activities and supply of non-neutral vendor information is strictly prohibited and Spectrum provides its expertise with no expectation of remuneration. Topics covered by Spectrum at workshops include filing of FCC Form 470 (a sample is filed with the attendees); filing of FCC Form 471 (a sample is filed with the attendees); discussion of Eligible Services, including newly eligible items; common carrier issues (billing, documentation, etc.); procurement strategies and the use of the California Multiple Awards Schedule ("CMAS"), CALNET, master agreements, and piggyback bids; documentation (what

⁹

The California E-Rate Training Collaborative, formally known as VETs (Volunteer E-Rate Trainers), is an *ad hoc* committee formed under the direction of the California Department of Education (CDE). The VETs' membership is comprised of (1) state employees from the CDE, California Public Utilities Commission, and California Department of General Services; (2) School District and Local Educational Agency employees; (3) common carrier representatives (Pacific Bell/SBC and Verizon); and (4) representatives of providers of internal connections services, such as Spectrum and others. The purpose of the VETs collaborative is to provide information and neutral advice to California schools and libraries about the federal E-Rate Program and the California Teleconnect Fund (the State's Universal Service Fund). The collaborative conducts one-day workshops throughout the state to provide general program information and updates to the greater applicant community in addition to running an electronic listserv (email server and forum) to provide answers to more specific or situational questions. Only five other private companies in California have received this honor, two of which are, like Spectrum, providers of internal connections services.

must be kept for audits); PIA and Selective Review (types of questions asked and possible answers); audits; and attendee questions and experiences. Workshop attendees receive a copy of the presentation on a CD-Rom as well as copies of the sample Form 470 and 471 with workshop instructions.¹⁰

Spectrum has attained the information technology industry's most highly regarded certifications including Registered Communications Distribution Designer (RCDD), Cisco Certified Internetwork Expert (CCIE), Microsoft Certified Systems Engineer (MSCE), Certified Novell Engineer (CNE) and 3Com certification. The company holds a General Contractor (B1) license, an Electrical Contractor (C10) license, and a Low Voltage and/or Communications Systems Contractor License (C7), which is required in order to install communications cabling.

II. REQUEST FOR EXPEDITED REVIEW

Commission rules allow the Wireline Competition Bureau 90 days to take action in response to a request for review of an SLD decision, but allow both the Bureau and the Commission routinely to extend this 90-day period.¹¹ The Parties respectfully request that the Bureau respond to this Request for Review within 90 days from the date hereof and, to the extent possible, to expedite its review.

The circumstances warrant expedited review of this request. The Decisions are based not on any violation of any Commission or SLD rule or precedent, but rather on a new standard, which SLD has attempted to enforce retroactively. Each Applicant's students are being

¹⁰ Spectrum understands that many E-Rate Program service providers conduct similar training. *See, e.g.,* Statement of Margaret Greene, BellSouth Corporation, before the FCC's Forum on the E-Rate Program, May 8, 2003, at 6-7.

¹¹ 47 C.F.R. § 54.724(a).

substantially harmed by the continuing delay in approval and receipt of funding for Funding Year 2002.¹² Moreover, the amount of time elapsed between the filing of each Applicant's Form 471 and the SLD's issuance of the Decisions was excessive – well over one year – and far longer than the average time for SLD decisions on Funding Year 2002 applications.

III. THE DECISIONS AND FURTHER EXPLANATIONS

On April 22, 2003, the SLD issued Decisions denying 16 FRNs associated with El Monte District's Application, 54 FRNs associated with Hemet District's Application, nine FRNs associated with Inglewood District's Application, four FRNs associated with Lucerne District's Application, five FRNs associated with Romoland District's Application, and 20 FRNs associated with Rosemead District's Application.¹³ For each FRN that was denied, the service provider was Spectrum.¹⁴ The "Funding Commitment Decision" and the "Funding Commitment Decision Explanation" for all of the denials (except the Inglewood District Denials) are identical, and state:

Funding Commitment Decision: \$0.00 – Bidding Violation

Funding Commitment Decision Explanation: Similarities in Internal Connections description on Forms 470 and in description provided to SLD of the vendor

¹² See pp. 4-8, *supra*; see also El Monte District Declaration of Nicasio J. Salerno ("El Monte District Declaration") at 4; Hemet District Declaration of Richard Hartline ("Hemet District Declaration") at 4; Inglewood District Declaration of George Beckwith ("Inglewood District Beckwith Declaration") at 4-5; Inglewood District Declaration of Alan Henderson ("Inglewood District Henderson Declaration"); Lucerne District Declaration of Jason Buchanan ("Lucerne District Declaration") at 4; Romoland District Declaration of David Guckert ("Romoland District Declaration") at 4.

¹³ Copies of the El Monte District Decisions, Hemet District Decisions, Inglewood District Decisions, Lucerne District Decisions, Romoland District Decisions, and Rosemead District Decisions are attached as El Monte District Exhibit 1, Hemet District Exhibit 1, Inglewood District Exhibit 1, Lucerne District Exhibit 1, Romoland District Exhibit 1, and Rosemead District Exhibit 1, respectively.

¹⁴ Additional FRNs were denied for reasons unrelated to this Request for Review and not involving bidding violations (for example, that the funding cap would not provide for internal connections to be funded at the discount requested).

selection process among applicants associated with this vendor indicate that vendor was improperly involved in the competitive bidding and vendor selection process.¹⁵

The Further Explanations also are identical.¹⁶ They state:

During the review of your application, USAC became aware of the fact that there were striking similarities in the description of the internal connection services sought on FCC Forms 470 among various applicants later associated with the same service provider. USAC further ascertained that the responses provided by various applicants associated with this particular service provider to the portion of the Selective Review questions described above seeking a description of the factors that the applicant used to determine the winning contracts contained identical language. Thus, USAC concluded that these responses had been prepared by the service provider and provided to the applicant, and were not prepared by the applicant as required under the Schools and Libraries Support Mechanism.

... Based on the evidence described above, USAC reasonably has concluded that the description of [the competitive bidding] process that you provided to USAC appears to have been prepared by your service provider.... It is inappropriate for a service provider to answer questions regarding the competitive bidding process, vendor selection, or the applicant's ability to pay the non-discount share as required by the Schools and Libraries Support Mechanism rules.

... USAC has concluded that the evidence described indicates that the service provider was improperly involved in the competitive bidding process and vendor selection process and that the applicant did not provide the answers to these questions. Consequently, USAC has denied all funding requests from this applicant associated with this service provider.¹⁷

As shown below, the Decisions and Further Explanations must be reversed, and the funding requests granted.

¹⁵ See *id.* The Inglewood District Decisions do not refer to "Internal Connection description on Forms 470." See Inglewood District Ex. 1.

¹⁶ Copies of the Further Explanations are attached as El Monte District Exhibit 2, Hemet District Exhibit 2, Inglewood District Exhibit 2, Lucerne District Exhibit 2, Romoland District Exhibit 2, and Rosemead District Exhibit 2, respectively.

¹⁷ El Monte District Ex. 2 at 2-3; Hemet District Ex. 2 at 2-3; Lucerne District Ex. 2 at 2-3; Romoland District Ex. 2 at 2-3; Rosemead District Ex. 2 at 2-3. As with the Decisions, the Inglewood District

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IV. SPECTRUM WAS NOT IMPROPERLY INVOLVED IN THE APPLICANTS' COMPETITIVE BIDDING AND VENDOR SELECTION PROCESS

The basis for the denials was the SLD's conclusion that "vendor was improperly involved in the competitive bidding and vendor selection process." The only evidence for this conclusion was SLD's factual determination that there existed (1) "similarities in Internal Connections descriptions on Forms 470 ... among applicants associated with this vendor" and (2) "similarities in description ... of the vendor selection process among applicants associated with this vendor." The errors in the Denials and the Further Explanations require that they be immediately reversed.

First, even assuming that "similarities" exist among the Applicants' Form 470 internal connection descriptions and Selective Review responses, those similarities do not support SLD's conclusion that Spectrum was "improperly involved" in any Applicant's competitive bidding and vendor selection process. Vendor involvement throughout the E-Rate funding process is both permitted and encouraged, and, until May 13, 2003, there was no prohibition on the types of vendor involvement SLD now deems "improper."

Second, the SLD's conclusions about the Applicants' Forms 470 are premised on mistaken factual determinations. The Form 470 process is not part of the competitive bidding and vendor selection process, the Applicants' Forms 470 are not similar, and in any event descriptions of the services an applicant seeks to purchase are precisely the "neutral, advisory role [of] ... provid[ing] basic information about the E-Rate Program and the application process" expressly permitted by SLD.

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Further Explanation differs in that it does not refer to the description of the internal connection services on Forms 470. See Inglewood District Ex. 2 at 2-3.

Third, Spectrum was not involved in the Applicants' actual competitive bidding and vendor selection process. *Descriptions* of the vendor selection process in the Applicants' Information Request responses – provided long after the competitive bidding and vendor selection process ended – cannot support a conclusion that Spectrum was “improperly involved” *during* that process.

Fourth, SLD's determination that “[i]t is inappropriate for a service provider to answer questions regarding the competitive bidding process [or] vendor selection” announces a new policy of which the Parties had no prior notice (and, indeed, contradicts explicit prior SLD guidance) and which, as applied retroactively to the Applicants, is unlawful.

Fifth, the conclusion that each Applicant did not “prepare” one of its Information Request responses because that response included information it received from Spectrum, is incorrect. Spectrum did not prepare the Information Request responses.

Finally, information provided by the Applicants, including their Information Request responses, demonstrates that each Applicant, as required by and in accordance with Commission rules and precedent, carefully considered all bids submitted, conducted fair and open competitive bidding, and did not surrender control of the competitive bidding or vendor selection process.

A. There Is No Prohibition on the Types of Vendor Involvement SLD Now Deems Improper

Even assuming that similarities exist among the Applicants' Form 470 internal connection descriptions and Information Request responses, those similarities do not support SLD's conclusion that Spectrum was “improperly involved” in any Applicant's competitive bidding and vendor selection process. Neither the Commission nor SLD prohibits “vendor involvement” at any stage of the E-Rate funding process. In fact, from the very inception of the

E-Rate Program, service providers have been encouraged to participate in all aspects of the program. As a result, the E-Rate Program has evolved into a highly collaborative process combining the efforts of USAC, SLD, applicant schools and libraries, telecommunications, internal connections, and Internet services providers, state officials, consultants, and others. As summarized below, information made available by USAC and SLD about each stage of the E-Rate funding process contains no prohibition on the type of “vendor involvement” SLD now deems improper.

1. The Form 470 Process

Resources for applicants include FCC Form 470 and the SLD web site. The Form 470 Instructions inform applicants that Form 470 “MUST be completed by the entity that will negotiate with potential service providers,”¹⁸ “cannot be completed by a service provider who will participate in the competitive bidding process as a bidder,”¹⁹ and must be signed by the person authorized to order the requested services on behalf of the applicant.²⁰

With respect to internal connections descriptions in Form 470 Block 2, the Form 470 Instructions refer applicants to the Eligible Services List on the SLD web site²¹ and the SLD Client Services Bureau, and state “[t]he specific data requested [is] sought to provide potential

¹⁸ FCC Form 470 Instructions at 2. A copy of FCC Form 470 is included as Attachment 1.

¹⁹ *Id.*

²⁰ *Id.* The Commission has held that a service provider who will participate in the competitive bidding process may not act, or be identified, as a contact person for a applicant on the Form 470, nor may it sign the Form 470. See *Mastermind Internet Services, Inc.*, 16 FCC Rcd 4028 (2000), ¶9 (“to the extent a Mastermind [the service provider] employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which Mastermind participated, such Forms 470 were defective and violated our competitive bidding requirements.”).

²¹ <<http://www.sl.universalservice.org/reference/eligible.asp>>.

service providers with information so that they may contact you if necessary for detailed information on your specific requirements.”²²

A more extensive discussion of the acceptable scope of vendor assistance and involvement than is found on Form 470, the SLD web site for applicants, or in the Commission’s rules, is set forth in “The SLD Guide to Service Provider Participation in the E-Rate” (the “Service Provider Guide”), located on the “Service Provider” page on the SLD web site.²³ Section 5 of the Service Provider Guide, “Service Provider Role in Assisting Customers,” makes clear that service provider involvement in an applicant’s efforts to obtain E-Rate funds is not inconsistent with the Program’s “fundamental principle” of fair and open competitive bidding.²⁴ SLD permits and encourages service providers and applicants to cooperate throughout the funding process. Thus, service providers may “assist[] in [the] Form 470 process,” including but not limited to “acting in a neutral, advisory role, to provide basic information about the E-Rate Program and the application process.”²⁵ Service providers may “assist in Request for Proposal (RFP) development,” “even if the service provider plans to submit a bid in response to that RFP....”²⁶ Service providers may “offer technical assistance on the development of a technical plan....”²⁷ All of this assistance, to the extent offered and provided, occurs before an applicant begins the competitive bidding process by filing Form 470.

²² Form 470 Instructions at 10.

²³ The web site is located at <<http://www.sl.universalservice.org/vendor/manual>>. A complete copy of the Service Provider Guide is included as Attachment 2.

²⁴ Service Provider Guide, § 5 at 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

2. The Competitive Bidding and Vendor Selection Process

"The purpose of the FCC Form 470 is to open a competitive bidding process for the services desired."²⁸ The Commission's rules, the SLD web site, and the Service Provider Guide contain little specific guidance about what communications between applicants and service providers may occur during the competitive bidding process – that is, the period between SLD's posting of an applicant's Form 470 and that applicant's selection of a service provider. Once an applicant's Form 470 is posted, it must be ready to accept bids from service providers, and then must consider all bids it receives before selecting a service provider or signing a contract with a service provider, and may not delegate that evaluation to a service provider.²⁹ The SLD web site includes a "Reference Area" with a brief section titled "Selecting Service Providers," which states, under the heading "What is the bidding process?", "Once you file your Form 470, it is posted to the SLD web site and competitive bidding can begin. The competitive bidding process requires a 28-day period during which service providers (vendors) may bid on the services you have requested on your Form 470.... You are required to wait 28 days after the posting of your Form 470 before you sign a contract or enter into an agreement for services."³⁰

The Service Provider Guide states that "the applicant should not have a relationship with the Service Provider prior to the competitive bidding that would unfairly influence the outcome of a competition nor would furnish the Service Provider with 'inside' information or allow them

²⁸ FCC Form 470 Instructions at 2. *See also* SLD web site, "Applicants Page," <<http://www.sl.universalservice.org/apply>> at 2 ("The FCC Form 470 opens a competitive process for the services desired.").

²⁹ 47 C.F.R. § 54.504(b)(4).

³⁰ <<http://www.sl.universalservice.org/reference/selectingsp>>.

to unfairly compete in any way.”³¹ An applicant may not reveal information to a service provider that the applicant does not share with all prospective bidders, and the competitive bidding process may not be conducted in such a way that only a particular service provider could win the bid.³² “[C]oercion or pressure to use a specific Service Provider” and “interfer[ence] with competitive bidding” are expressly prohibited.³³

3. Post-Vendor Selection

Vendor involvement continues after an applicant selects a vendor and enters into a contract. For example, during an applicant’s preparation of Form 471, which is the formal request for funding, “[t]he chosen Service Provider is expected to be a resource to the applicant for information about the technology, the products and the services that are being furnished to the applicant. The Service Provider should provide information that the applicant can include with their [Form 471] application, as the supporting documentation which describes in detail the services being ordered.”³⁴ Furthermore, “[t]his role [*i.e.*, serving as “a resource to the applicant

³¹ Service Provider Guide, § 5 at 1. Neither the SLD nor the FCC has stated that an applicant and a service provider may not have any relationship prior to the Form 470 process for a particular funding year; presumably, no such prohibition exists because the Commission always has recognized that applicants in the normal course of business frequently have continuing or long-standing relationships with numerous vendors, including the local telephone company, which may have no competition for E-Rate funded services. *See Mastermind* at n.35 (“Even if an incumbent service provider might have a competitive advantage in a bidding process, it does not exert control over the bidding process to the disadvantage of other potential bidders.”). The Commission could have, but did not, require applicants to contract each *Funding Year* exclusively with vendors with whom the applicant had no prior relationship in any prior *Funding Year*.

³² Service Provider Guide, § 5 at 2.

³³ *Id.*

³⁴ *Id.*, § 5 at 3.

for information about the technology, the products and the services that are being furnished to the applicant”] may not end with the funding Commitment Decision Letter.”³⁵

4. Program Integrity Assurance and Selective Review Information Request

The Service Provider Guide defines Program Integrity Assurance (“PIA”) as “part of the NECA function; review applications and invoices for compliance with program rules,”³⁶ and states:

Program Integrity Assurance Contacts:

Application Review – Application review is conducted by Program Integrity Assurance staff who are contractors located in New Jersey. They review the Form 471 and supporting documentation.... It is possible that PIA staff may reach out to the applicant, the Service Provider or both in an effort to clarify information contained in the application or supporting documentation.

PIA operates on a limited timeframe to resolve issues with applications. PIA may impose restrictions on when information can be returned to PIA. Please help your applicants comply with those deadlines, where possible.³⁷

The Service Provider Guide also states that “[b]oth the applicant and the Service Provider can be resources to Program Integrity Assurance (PIA) staff during application review, whether that occurs prior to the original funding commitment or at a later stage due to a change in circumstances.”³⁸

Neither the SLD’s Applicant web page, the Service Provider Guide, nor the Commission’s rules contain any reference to the Selective Review Information Request (“Information Request”) process, which is a part of the PIA function. On May 13, 2003 – three

³⁵

Id.

³⁶

Id., § 2 at 2.

³⁷

Id., § 6 at 2 (“SLD Communications Regarding Applications”).

weeks after the Denials – SLD posted to the “What’s New!” page of its web site an announcement titled “Service Providers Cannot Respond to Selective Review Requests” (the “Selective Review Announcement”).³⁹ The Selective Review Announcement states, in relevant part:

The SLD selects some applicants for a Selective Review to ensure that they are following certain FCC rules.... Applicants who are chosen for Selective Reviews are sent the E-Rate Selective Review Information Request.

As part of this request, applicants are asked to answer certain questions and provide documentation regarding their competitive bidding and vendor selection process....

The person authorized by the applicant to sign on the applicant’s behalf, or the entity’s authorized representative, is required to certify that the authorized signer prepared the responses to the Selective Review Information Request on behalf of the entity.

The SLD has become aware that, in some cases, service providers have provided the answers to the Selective Review Information Request. The SLD allows service providers to serve as the contact person on FCC Forms 471 because the service provider is often in the best position to answer the SLD’s questions regarding the services for which funding has been sought on the Form 471. However, it is not appropriate for service providers to provide the answers to the Selective Review Information request. In particular, the service provider selected by the applicant must not answer questions regarding the competitive bidding process, vendor selection, and the applicants’ ability to pay their share of the cost. The applicant or its authorized consultant (which cannot be the applicant’s service provider) is responsible for answering these questions. To emphasize this responsibility, the SLD requires applicants to certify that they have provided the answers to the Selective Review Information Request.

(Footnote continued from previous page)
Id., § 5 at 3.

³⁹

<<http://www.sl.universalservice.org>>, “What’s New!”. A copy of the announcement is included as Attachment 3. The web site contains a link to the Information Request, which apparently is the first public availability of that form (a copy of which is included as Attachment 4).

The SLD has denied and will continue to deny funding requests where there is evidence that the service provider, rather than the applicant or its authorized representative, provided the answers to these questions.⁴⁰

The E-Rate Selective Review Information Request Instructions and Worksheet (the “Information Request Worksheet”), which is the form referred to in the Selective Review Announcement, states “[t]his fax requests information that must be provided by the applicant, or by the applicant’s authorized representative.”⁴¹ The Information Request Worksheets received by the Applicants in 2002 contained no specific prohibition on service provider assistance.

As shown below, SLD found no violation of any rule or policy in effect at the time the Applicants filed their applications and submitted their responses to the PIA staff’s Information Requests.

B. SLD’s Conclusions Regarding the Applicants’ Forms 470 Are Premised on Mistaken Factual Determinations

The SLD’s conclusion that “similarities” among the Applicants’ Forms 470 internal connection descriptions “indicate” improper vendor involvement in the competitive bidding process, is premised on two mistakes of fact. First, the posting of Form 470 begins the competitive bidding process. Vendor assistance in preparing Form 470 (which is not prohibited) occurs prior to posting and thus by definition is not part of the competitive bidding process. Second, the Applicants’ Forms 470 are not similar.

As noted above, Form 470 clearly states that the competitive bidding and vendor selection process begin when an applicant’s Form 470 is posted. There is no “competitive bidding process” prior to posting. Consequently, “similarities” in the descriptions of services on

⁴⁰

Id.

which the applicants will seek bids cannot be the basis for concluding that a vendor who bid on those services was improperly involved in the bidding process.

Neither the Decisions nor the Further Explanations explained what “striking similarities”⁴² in internal connection description the SLD observed, and a review of the Applicants’ Forms 470 reveals no such similarities. Form 470 asks if the applicant has a Request for Proposal (“RFP”) that specifies the services it is seeking. If the applicant answers “no,” Block 2, Item 10 (“Summary Description of Needs or Services Requested”) further requires the applicant to “list below the Internal Connections Services you seek. Specify each service or function (e.g., local area network) and quantity and/or capacity (e.g., connecting 10 rooms and 300 computers at 56Kbps or better).” Each Applicant answered “no” regarding an RFP, and thus listed the internal connection services on which it sought bids.⁴³ The El Monte District listed 95 separate services or functions, for each of 8 sites.⁴⁴ The Hemet District listed five separate services or functions, with a different quantity or capacity specified for each.⁴⁵ The Lucerne District listed 108 separate services or functions, with the quantity or capacity to be specific by school district.⁴⁶ The Romoland District listed six separate services or functions, with a different

(footnote continued from previous page)
Information Request at 1.

⁴² See, e.g., El Monte District Ex. 2, p. 2.

⁴³ Copies of the Applicants’ Forms 470 are attached as El Monte District Exhibit 3, Hemet District Exhibit 3, Lucerne District Exhibit 3, Romoland District Exhibit 3, and Rosemead District Exhibit 3, respectively.

⁴⁴ El Monte District Ex. 3 at 4-6.

⁴⁵ Hemet District Ex. 3 at 3-4.

⁴⁶ Lucerne District Ex. 3 at 4-6.